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In The

Supreme Court of the United States

OCTOBER TERM, 1992

BLUE CROSS AND BLUE SHIELD
MUTUAL OF OHIO,
Petitioner,

vs.

LIBBEY-OWENS-FORD CO., AS ADMINISTRATOR OF THE
GROUP HEALTH INSURANCE PLAN,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

ISSUE I

Whether litigants can bestow finality and appellate court jurisdiction on an interlocutory district court decision by seeking and consenting to, without reservation of any right to appeal, a voluntary adverse dismissal under Fed. R. Civ. P. 41(a)(2)?

ISSUE II

Whether a person can be deemed a fiduciary to an ERISA employee welfare benefit plan to an unlimited extent and degree by virtue of the determination that it performed limited discretionary functions related to participants and beneficiaries?

ISSUE III

Whether the common law of trusts can be utilized by the courts as a basis to expand and, in essence, judicially legislate new remedies under ERISA or must courts follow the dictates of *Massachusetts Mutual Life Insurance Co. v. Russell*, 473 U.S. 134 (1985)?

PARTIES TO THE PROCEEDING

This Petition is filed by Blue Cross and Blue Shield Mutual of Ohio and plaintiff/appellant below was Libbey-Owens-Ford Co., in its capacity as Administrator of its Group Health Insurance Plan.[1]

In addition to the parties named in the caption of this Petition, a Third-Party Complaint directed against Trinova Corporation[2] and Libbey-Owens-Ford Co., in its capacity as employer and plan sponsor of the aforementioned Group Health Insurance Plan, was filed in the proceedings below. These additional parties did not participate in the court of appeals proceedings and are not anticipated to be involved in the proceedings before this Court.

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[1] Blue Cross and Blue Shield Mutual of Ohio has no parent companies, and has no non-wholly owned subsidiaries.

[2] The relationship between Libbey-Owens-Ford Company, Libbey-Owens-Ford Co. and Trinova Corporation is described in the "Statement of the Case".

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MUTUAL OF OHIO,
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v.

LIBBEY-OWENS-FORD CO., AS ADMINISTRATOR OF THE
GROUP HEALTH INSURANCE PLAN,
Respondent.

Petitioner respectfully prays that a writ of certiorari issue to review the judgment and opinions of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The January 13, 1993 opinion of the United States Court of Appeals for the Sixth Circuit is reported at 982 F.2d 1031. App. 1a.

The January 2, 1992 decision of the United States District Court for the Northern District of Ohio, Eastern Division in Civil Action No. 3:90CV7246 is not reported. App. 13a.

JURISDICTION

On February 1, 1993, the court of appeals denied a timely petition for rehearing. App. 40a. The court of

appeals also denied a suggestion for rehearing in banc.[3] App. 41a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The case involves the Employee Retirement Income Security Act of 1974 ("ERISA") as well as the statutes and rules invoked for determining whether an appeal properly lies.

Rule 41(a)(2) of the Federal Rules of Civil Procedure provides:

> By Order of Court. Except as provided in paragraph (1) of this subdivision of this rule, an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper. If a counterclaim has been pleaded by a defendant prior to the service upon the defendant of the plaintiff's motion to dismiss, the action shall not be dismissed against the defendant's objection unless the counterclaim can remain pending for independent adjudication by the court. Unless otherwise specified in the order, a dismissal under this paragraph is without prejudice.

28 U.S.C. § 1291 provides:

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[3] BCBSO filed its Suggestion for Rehearing In Banc separate from and subsequent to its Petition for Rehearing based upon this Court's decision in *Missouri v. Jenkins*, 495 U.S. 33 (1990). As noted in that decision, "[a] party may petition for rehearing before the panel under Rule 40, file a suggestion for a rehearing in banc under Rule 35, or do both, separately or together." 495 U.S. at 47. Nevertheless, the Sixth Circuit denied petitioner's Suggestion. The Sixth Circuit should be ordered to follow this Court's *Missouri* mandate. Otherwise, litigants in the Eighth Circuit, where the *Missouri* case originated, will have greater appellate rights than litigants in the Sixth Circuit.

> The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court of the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A) provides:

> Except as otherwise provided in subparagraph (B), a person is a fiduciary with respect to a plan to the extent (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, (ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan. Such term includes any person designated under section 1105(c)(1)(B) of this title.

ERISA § 409(a), 29 U.S.C. § 1109(a) provides:

> Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this title shall be personally liable to make good to such plan any losses to the plan resulting from each such

> breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary. A fiduciary may also be removed for a violation of section 411 of this Act.

ERISA § 502(a), 29 U.S.C. § 1132(a) provides in relevant part:

> A civil action may be brought —
>
> (1) * * *
>
> (2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 409;
>
> (3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violated any provision of this title or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this title or the terms of the plan; . . . .

STATEMENT OF THE CASE

The contractual relationship between Libbey-Owens-Ford Co. and Blue Cross and Blue Shield Mutual of Ohio[4] or their respective predecessors[5] spanned a

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[4] Libbey-Owens-Ford Co. and Blue Cross and Blue Shield Mutual of Ohio shall be referred to herein as "LOF" and "BCBSO" respectively.

[5] Libbey-Owens-Ford Company and the current Libbey-Owens-Ford Co., it must be noted, are not the same corporate entity. Libbey-Owens-Ford Company sold its subsidiary, LOF Glass, Inc., to Pilkington Holdings, Inc. in 1986 and thereafter became Trinova Corporation. LOF Glass, Inc., meanwhile, then changed its name to Libbey-Owens-Ford Co.

One predecessor of BCBSO is Blue Cross of Northwest Ohio.

period of nineteen years. It began in 1968 when the parties entered into a Master Group Operating Agreement ("MGOA") by which Blue Cross of Northwest Ohio agreed to provide health benefit insurance coverage to the eligible employees and their dependents of Libbey-Owens-Ford Company. Each and every year, LOF renewed its agreement with BCBSO or its predecessor.

In 1980, the parties entered into an Amendment to Group Contract. By that Amendment, LOF undertook to self-fund, rather than insure, the health benefits of its employees, paying claims from its general assets through BCBSO or its predecessor to the various health care providers rendering services to LOF employees. The functions performed by BCBSO or its predecessor pursuant to the MGOA and Amendment to Group Contract during the nineteen year period did not change. BCBSO or its predecessor processed and paid health claims of eligible LOF employees and their dependents pursuant to and in accordance with the MGOA and the Amendment, no more and no less. LOF terminated its relationship with BCBSO as of December 31, 1987.

During the nineteen years of the relationship at issue, BCBSO or its predecessor had contracts with certain area health care providers to which Libbey-Owens-Ford Company and LOF were not privy or a party. Those provider health care contracts were in existence long before the parties hereto entered into any agreement, and have continued after the termination of the relationship herein. Those provider agreements were not account specific, but dealt with health care services in general and touched upon employees of many companies other than LOF. By the terms of those contracts, hospital audits were conducted and the proceeds of those audits, when determined to be due and

owing, were paid to BCBSO or its predecessor. BCBSO has contended and continues to contend that Libbey-Owens-Ford Company, Libbey-Owens-Ford Co. and Trinova Corporation never had any contractual or other legal entitlement to receive the proceeds of the hospital audits; nor did they have a contractual obligation or ever offer to pay additional monies when the audits revealed BCBSO owed sums to the area providers. They never bargained or negotiated for a share of the proceeds from the hospital audits nor obligated themselves to tender further monies to the providers if such audits revealed additional funds were owed to the providers.

I. THE PROCEEDINGS BELOW

A. The District Court

Nonetheless, LOF, on May 21, 1990, commenced litigation in district court against BCBSO concerning in significant part various claims relating to the proceeds of the hospital audits referenced above. LOF's Amended Complaint contained claims based upon ERISA and upon state law seeking, among other things, punitive damages, contractual damages and an accounting. Federal court jurisdiction was based upon 28 U.S.C. § 1331, 29 U.S.C. § 1132(a) and (e)(1) and the doctrine of pendent jurisdiction.

Discovery was commenced by both parties. Court hearings were underway concerning a suitable protective order so that BCBSO could produce certain confidential matters falling within LOF's requests. At that moment and, more specifically, on March 8, 1991, LOF sought to hold further proceedings and discovery in abeyance while it proceeded with the filing of its Motion for Partial Summary Judgment. LOF represented to the district court and BCBSO that, if its motion was denied, it would consider terminating the lawsuit be-

cause of the considerable expense involved in federal court litigation. LOF never advised that it intended to appeal. The district court granted LOF leave to proceed in this manner.

LOF's Motion for Partial Summary Judgment was filed on April 8, 1991. The issues presented by LOF's Motion were twofold: first, was BCBSO an ERISA fiduciary to LOF's Plan and, if so, second, was LOF entitled to an accounting upon demand from BCBSO, *i.e.*, before a determination of any liability or breach of duty by BCBSO?

The district court denied LOF's Motion for Partial Summary Judgment. It ruled that BCBSO was not an ERISA fiduciary to LOF in the latter's capacity as a Plan Administrator.[6] It further found no support in ERISA or the common law of trusts for LOF's requested accounting upon demand.

LOF never sought reconsideration of the district court's ruling. Nor did LOF ever seek leave to pursue an immediate appeal, pursuant to Fed. R. Civ. P. 54(b), of the district court's interlocutory decision relating to the Motion for Partial Summary Judgment.

Instead, LOF represented to the district court and BCBSO that "[t]he cost of this protracted litigation or any further litigation is something that Libbey-Owens-Ford Company [sic] does not wish to engage," and filed its Motion to Dismiss Without Prejudice pursuant to Fed. R. Civ. P. 41(a)(2). BCBSO opposed the LOF Motion, seeking a dismissal with prejudice of the case in its entirety and attorneys' fees.

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[6] The district court did find that BCBSO was an ERISA fiduciary to LOF Plan participants and beneficiaries, but *only* to the extent that BCBSO determined appeals of claims denials. BCBSO never appealed that narrow finding of fiduciary status.

The district court, in ruling on LOF's Rule 41 Motion, gave LOF a choice. App. 36a. It could either choose to accept the terms and conditions the district court would impose on the LOF-sought dismissal or it could choose to withdraw its Rule 41 Motion and proceed with its case. The district court expressly stated that it would indeed retain jurisdiction over LOF's case should it decide to so proceed.

LOF, however, did not choose to withdraw its Rule 41 Motion and proceed with its case. Instead, it chose to accept the terms and conditions of dismissal established by the district court. The dismissal order accepted by LOF was thereafter entered. App. 13a.

During the course of the lower court proceedings, LOF never notified the court or BCBSO of its intention to appeal the issues raised by its previous Motion for Partial Summary Judgment. Further, LOF did not reserve its right to appeal or request such a reservation of rights in the district court's dismissal order. Moreover, LOF never advised or served notice that its Rule 41 dismissal was designed to expedite review of the district court order denying its partial summary judgment motion.

Meanwhile, BCBSO was never permitted, in the abbreviated district court proceedings, to develop through discovery and substantiate its own multiple meritorious defenses to LOF's allegations including its statute of limitations defense which, BCBSO contends, would be a complete and total bar to the allegations at hand.

Contrary to its representations to the district court that the litigation had ceased, LOF filed a notice of appeal. It based its assertion of appellate jurisdiction upon 28 U.S.C. § 1291. BCBSO, as discussed below,

disputed the existence of jurisdiction before the court of appeals.

B. The Court Of Appeals

The United States Court of Appeals for the Sixth Circuit reversed the district court's ruling on the Motion for Partial Summary Judgment. Indeed, it went even further. It granted LOF affirmative relief under ERISA despite the fact that BCBSO was never and has never been to this date permitted to present any of its defenses that bar LOF from recovery under ERISA and otherwise.

The court of appeals' decision evidenced both a misunderstanding of the facts of the case as well as the course of proceedings at the district court level. The court of appeals, for example, found as fact that:

> It [BCBSO] audited hospital bills annually in order to determine whether any charges could be eliminated. If the revised hospital bills were less than the amounts paid by Blue Cross during the year, Blue Cross received refunds or rebates from the hospitals.

App. 4a. This purported "fact" was never proven at the district court level nor admitted by BCBSO. No evidence of any kind was received on this issue. Rather, BCBSO strenuously denies that any such "revised" billings occurred or that BCBSO received bill "refunds" or "rebates" from hospitals.

The court of appeals continued by describing its understanding of the course of proceedings as follows:

> On November 25, 1991, the district court issued an opinion that set forth the conditions for dismissal and allowed Libbey-Owens-Ford the option of withdrawing its motion for partial summary judg-

> ment and proceeding with the case. In the opinion, the district court held that Blue Cross was not a fiduciary and did not have to provide an accounting to Libbey-Owens-Ford. Based upon this determination, the court ordered dismissal with prejudice of the claim for breach of common law fiduciary duties and the ERISA claims. Nonetheless, Libbey-Owens-Ford did not withdraw its motion to dismiss, and it proceeded on the merits of the case.

App. 6a. Each and every sentence of this recital of events was incorrect. More specifically:

> *Sentence No. 1* is incorrect.
>
> LOF never sought nor was it given the option to withdraw its Motion for Partial Summary Judgment.
>
> *Sentence No. 2* is incorrect.
>
> The district court found that BCBSO *was* an ERISA fiduciary to plan participants and beneficiaries. App. 32a.
>
> *Sentence No. 3* is inaccurate.
>
> Dismissals with prejudice were only entered by the district court after LOF solicited dismissal and agreed to the district court's conditions including the "with prejudice" dismissal of its ERISA claims. The dismissals with prejudice were entered by the district court only after *LOF elected not to proceed on the merits* and sought dismissal.
>
> *Sentence No. 4* is incorrect.
>
> LOF never proceeded on the merits of the case although it was given the opportunity to do so by the district court. Instead, LOF chose to accept the district court's conditions, and terminated the case. *LOF reserved no right to appeal, either orally or in*

the Final Judgment Order entered. LOF never stated it sought an expedited review to the appellate level.[7]

With the above misunderstandings in mind, the court of appeals, first, concluded that it had jurisdiction to entertain LOF's appeal. Specifically, it invoked, although it did not directly cite, the "expedite review exception" as originated in the case of *United States v. Proctor & Gamble Co.*, 356 U.S. 677 (1958).

The "expedite review exception" which permits appellate review of voluntary adverse judgments, and which was sparked by the *Proctor & Gamble* decision, has been considered and developed by the various circuits. However, it has not been the subject of this Court's scrutiny since 1958. The court of appeals in the present matter cited to the progressive Sixth Circuit authority generated by the *Proctor & Gamble* decision, but inexplicably did not adhere to the requirements of that authority.

Second, the court of appeals concluded that BCBSO was an ERISA fiduciary to LOF to an apparently unlimited scope or degree. App. 10a, 11a-12a. It did not discuss, interpret or mention the district court's ruling that BCBSO was an ERISA fiduciary to LOF participants and

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[7] Multiple additional errors exist as well. For example, the court of appeals determined that LOF is a "participant" in an ERISA plan (App. 11-12a) and BCBSO its fiduciary. However, the term "participant," defined at 29 U.S.C. 1002(7), meaning ". . . any employee or former employee of an employer . . ." is clearly inapplicable to the company LOF. LOF itself never argued that it was an ERISA "participant" yet the court of appeals so held. In fact, even the caption of the case styled by the court of appeals was incorrect. It denoted LOF, as Administrator of The Group Health Insurance Plan, as both Plaintiff-Appellant and Third-Party Defendant. App. 1a. Yet, BCBSO *never* sued LOF in its capacity as Administrator in its Third-Party Complaint. Its Third-Party Complaint, instead, was directed to LOF in its capacity as plan sponsor. 29 U.S.C. § 1002(16)(B). An employer or plan sponsor may, but need not necessarily, serve as plan administrator.

beneficiaries, but only to the extent of its resolution of claims denials and appeals. It did not discuss, interpret or mention 29 U.S.C. § 1002(21)(A) which states that a person is an ERISA fiduciary, but *only to the extent* that he exercises discretionary authority or control. It did not discuss, interpret or mention the conflicting authority of the circuits in this regard.

Third and finally, the court of appeals in its opinion determined that BCBSO, in its capacity as an ERISA fiduciary, had a duty to account upon demand to LOF. Disregarding ERISA's § 1109, it based this conclusion upon common law trust principles and the *Restatement (Second) of Trusts*. App. 11a. By that decision, a new remedy under ERISA has been judicially legislated. It is one in conflict with this Court's prior decision in *Massachusetts Mutual Life Insurance Co. v. Russell*, 473 U.S. 134 (1985). The court of appeals did not distinguish or discuss the *Russell* decision in its opinion.

REASONS FOR GRANTING WRIT

The process of litigation, the actual mechanism utilized to test and resolve adverse viewpoints, is long established. The various procedural devices available to litigants have been refined and shaped over time, but the overall concept and fundamental principles remain very much the same. The process and procedures of litigation are important; only through their proper use is a just result envisioned and achieved. To circumvent that process is to eviscerate the means by which we test competing theories and viewpoints. For any court to permit or condone the short-cutting of that process is to invite error.

The present case illustrates all too well the profoundly flawed results that can occur when the litigation process itself is permitted to be bypassed and the court

of appeals entertains an improper appeal. Unless this Court addresses the manufacturing of finality condoned by the court of appeals, a veritable flood of appeals can reasonably be expected when a litigant is not happy with an interlocutory decision and when litigation subjectively becomes "too expensive". Further, the present case provides this Court with the opportunity to address the problems created by an overly zealous judiciary which has, in every respect, acted as a legislative body in concocting new remedies under ERISA. Such unrestrained judicial activity represents a violation of the due process rights of BCBSO and others similarly situated, introduces uncertainty in determining what legal functions and responsibilities one is obligated to perform, and obliterates the distinct functions to be performed by the three branches of our federal government. Even more troubling is the precedent that will now allow what Congress in its wisdom did not — an accounting upon demand.

ISSUE I

Litigants Should Not Be Entitled To Full Appellate Review Of An Interlocutory District Court Decision By Seeking And Consenting To, Without Reservation Of Any Right To Appeal, A Voluntary Adverse Dismissal Under Fed. R. Civ. P. 41(a)(2).

This Court is primarily responsible for the proper functioning of the federal judicial system. The grant of certiorari in cases involving federal jurisdiction, practice and procedure reflects that responsibility. Petitioner requests that this Court grant the writ of certiorari in order to establish the proper manner and means for a party to solicit a dismissal of an action designed only to expedite review in the appellate courts.

The rule is familiar and of long standing that a plaintiff who has voluntarily dismissed its complaint may not pursue error on appeal. *United States v. Proctor & Gamble Co.*, 356 U.S. 677 (1958). Absent is the requisite involuntary judgment from which an appeal can proceed under 28 U.S.C. § 1291. The court in *Proctor & Gamble*, however, recognized that an exception to this rule can be appropriate.

In *Proctor & Gamble*, the issue of appellate jurisdiction was postponed until the argument on the merits of the case. The Government refused to comply with a district court order to turn over what was traditionally sacrosanct grand jury testimony as part of discovery in a civil antitrust action. The Government proposed the discovery order be amended to provide dismissal of its case if production was not made. Alternatively, the Government requested the order be stayed pending the filing of an appeal and application for extraordinary writ. The district court entered the amended order to dismiss. In a nine sentence paragraph, this Court stated that "[w]hen the Government proposed dismissal for failure to obey, it had lost on the merits and was only seeking an expeditious review."[8] *Proctor & Gamble*, 356

[8] The courts of appeals have generally agreed that *Proctor & Gamble* established the "expedite review exception" to the rule against appeals of voluntary dismissals. *See St. Paul Fire & Marine Insurance Co. v. United States*, 959 F.2d 960, 962 (Fed. Cir. 1992); *Empire Volkswagen, Inc. v. World-Wide Volkswagen Corp.*, 814 F.2d 90, 94 (2d Cir. 1987); *Distaff, Inc. v. Springfield Contracting Corp.*, 984 F.2d 108, 110-111 (4th Cir. 1993); *Raceway Properties, Inc. v. Empire Corp.*, 613 F.2d 656, 657 (6th Cir. 1980); *United States v. Rent-A-Homes Systems of Illinois*, 602 F.2d 795, 797 (7th Cir. 1979); *Dorse v. Armstrong World Industries, Inc.*, 798 F.2d 1372, 1375 (11th Cir. 1986); *See also Trevino-Barton v. Pittsburgh National Bank*, 919 F.2d 874, 878 (3d Cir. 1990) (court relied on the other circuits' interpretations of *Proctor & Gamble* to find the "exception"); *Plasterers Local Union No. 346 v. Wyland Enterprises, Inc.*, 819 F.2d 217, 218-219 (9th Cir. 1987); *Britton v. Co-Op Banking Group*, 916 F.2d 1405 (9th Cir. 1990) (courts in Plasterers and Britton confined the *Proctor & Gamble* "exception" to the situation

U.S. at 681. The Government was not required to contest the production order by way of civil contempt and an appeal was allowed.

The *Proctor & Gamble* "expedite review exception" has not been addressed by this Court in 35 years. One circuit, the Ninth, has interpreted it narrowly, applying it only when the plaintiff faces the prospect of contempt. *Plasterers Local Union No. 346 v. Wyland Enterprises, Inc.*, 819 F.2d 217 (9th Cir. 1987). Others have applied it broadly, as evidenced by the Sixth Circuit decision in *Raceway Properties, Inc. v. Empire Corp.*, 613 F.2d 656, 657 (6th Cir. 1980) (". . . [T]his court found the order of dismissal was appealable because of the appellants' solicitation of the formal dismissal was designed only to expedite review of an order which had in effect dismissed appellants' complaint.").

The majority of courts addressing the *Proctor & Gamble* "exception" have indeed accepted and adopted the broader view and interpretation of the exception as found in *Raceway*. However, the exception was further refined in a manner consistent with what was deemed its original intent in the case of *Laczay v. Ross Adhesives*, 855 F.2d 351 (6th Cir. 1988), *cert. denied*, 489 U.S. 1014 (1989).

The *Laczay* court, mindful of the potential for abuse, stated that "[s]ince ordinarily a party who consents to entry of a judgment has no right to appeal, one who seeks to come within an exception to this rule should make his or her intention known to the court and the opposing parties." *Id.* at 354. Citing *Coughlin v. Regan*, 768 F.2d 468, 470 (1st Cir. 1985), the court

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where a plaintiff is faced with the prospect of contempt or default); *but cf. Unioil, Inc. v. E.F. Hutton & Co.*, 809 F.2d 548, 554-55 (9th Cir. 1986), *cert. denied*, 484 U.S. 822, 823 (1987) (conditional voluntary dismissal may be appealable if adverse to appealing party).

emphasized that "'to consent to a judgment and still preserve his right to appeal, a plaintiff must reserve that right unequivocally, as it will not be presumed.'" *Id.* The *Laczay* court found this requirement inherent in the Supreme Court's *Proctor & Gamble* decision, since "the government did make it clear to the district court and to the defendant that it requested a final order of dismissal solely for the purpose of expediting an appeal." *Id.*

Based upon the facts of its case, the Sixth Circuit in *Laczay* concluded:

> Under all of these circumstances we do not believe this is an appropriate case for an appeal from a dismissal entered at the behest of the party now seeking to appeal. It was incumbent upon the plaintiff to determine by careful analysis whether the prior ruling of the court actually did have the effect of a final adverse judgment on the merits. If such a determination was made, *he then had the responsibility to inform the court and opposing parties that he was seeking a final order of dismissal with prejudice for the sole purpose of obtaining an expeditious review of the prior order, and of reserving that right unequivocally in the stipulation or the order. Having done none of these things, the plaintiff did not preserve a right of appeal. (Emphasis added.)*

Id. at 355; *accord Dorse v. Armstrong World Industries, Inc.*, 798 F.2d 1372, 1376-1377 (11th Cir. 1986); *Distaff, Inc. v. Springfield Contracting Corp.*, 984 F.2d 108, 111 (4th Cir. 1993).

The decision from the court of appeals in the present matter ignores, and in effect overrules, the *Laczay* decision's logical restraints on a plaintiff who desires to pursue a *Proctor & Gamble* appeal. Petitioner asks this Court to grant certiorari in this case to insure

clarity and uniformity among the various circuits in permitting the *Proctor & Gamble* "exception". Are the majority of the courts of appeals correctly applying a broad interpretation of the passage? If the broad interpretation was intended, are there conditions precedent, such as those found by *Laczay*, which are inherent in invoking the "exception"? The present case provides the clearest vehicle to answer these questions.

LOF unquestionably sought dismissal of its own case before the district court. Also, there is no dispute that it was given the opportunity by the district court to either accept the conditions imposed by that court or proceed with the merits of its case. LOF chose the former. While LOF later argued on appeal that it never consented or agreed to those conditions, it is difficult to fathom how else to categorize such conduct in light of the record.

A plaintiff who knows he may withdraw his motion for voluntary dismissal will be deemed to have consented to the conditions attached to the voluntary dismissal unless he withdraws his dismissal motion within a reasonable time. *Unioil, Inc. v. E.F. Hutton & Co.*, 809 F.2d 548, 554-555 (9th Cir. 1986), *cert. denied*, 484 U.S. 822 (1987); *Beard v. Sheet Metal Workers Union, Local 150*, 908 F.2d 474 (9th Cir. 1990). Likewise, under what has been termed the "consent to judgment rule," a party who accepts a judgment *in toto* without a reservation of rights to appeal may not later pursue an appeal. *Wynfield Inns v. Edwards Leroux Group, Inc.*, 896 F.2d 483 (11th Cir. 1990); *cf. Juntunen v. Sea-Con Services, Inc.*, 879 F.2d 154 (5th Cir. 1989).

At no time before, during, or after the district court's final judgment order did LOF reserve a right to appeal because the "solicitation of the formal dismissal was designed only to expedite review of an order which

had in effect dismissed appellants' complaint." *Raceway Properties, Inc.*, 613 F.2d at 657. Pursuant to the *Laczay* interpretation of this Court's decision, this case does not fall within the *Proctor & Gamble* "exception" granting appellate jurisdiction. Given the consensual conduct of LOF, the right to appeal was waived. Even had appellate jurisdiction been available, jurisdiction was clearly limited to whether the district court abused its discretion in conditioning the dismissal in part with prejudice under Rule 41(a)(2). Instead, for the benefit of no one but a plaintiff who created its own predicament, the Sixth Circuit panel herein granted "expedite review" of the entire partial summary judgment order. This is not the type or the manner of appeal contemplated by this Court in *Proctor & Gamble*.

The danger in expanding the *Proctor & Gamble* "exception" of review is evident in this case. Finality could easily be manufactured. Once an adverse decision on partial summary judgment has been made and a case becomes "too expensive to pursue", a voluntary dismissal can be taken and, without notice, an appeal of previously interlocutory decisions can proceed. The process of litigation, the avenues of discovery and the right to a trial could be bypassed and never recovered. As evidenced in the "Statement of the Case", the summary nature of the court proceedings is likely to promote error.

Petitioner asks this Court to grant its writ of certiorari not only to interpret the broad implications of the *Proctor & Gamble* "exception," but also to correct the gross misconstruction of fact and procedure by the court below.

ISSUE II

The Court Of Appeals' Decision That Deemed A Limited Fiduciary As A Fiduciary For All Purposes, In Conflict With Decisions Of Other Courts Of Appeals, Undermines The Consistent And Uniform National Application Of ERISA And Is Contrary To Statutory Interpretation.

Title 29 U.S.C. § 1002(21)(A) establishes the statutory basis for determining fiduciary status under ERISA. That provision states as follows:

> a person[9] is a fiduciary with respect to a plan *to the extent* . . . he has any discretionary authority or discretionary responsibility in the administration of such plan . . . . (*Emphasis added*).

The circuits addressing this issue have determined that ERISA fiduciary status is not an all-or-nothing concept. A "person" found to be an ERISA fiduciary for some limited purpose is not, by inference or implication, to be deemed a fiduciary for *all* purposes. *Coleman v. Nationwide Life Insurance Company*, 969 F.2d 54, 60-62 (4th Cir. 1992), *cert. denied*, 113 S. Ct. 1051 (1993); *Leigh v. Engle*, 727 F.2d 113, 133 (7th Cir. 1984); *Sommers Drug Stores Co. Employees Profit Sharing Trust v. Corrigan Enterprises, Inc.*, 793 F.2d 1456, 1459-60 (5th Cir. 1986), *cert. denied*, 479 U.S. 1034, 1089 (1987). The above analysis stems from the phrase "to the extent" utilized by Congress in the above-cited provision of ERISA, which indicates a person is a fiduciary only as to those areas of the plan that the person exercises authority and control. Thus, in *Coleman*,[10] the Fourth Circuit

[9] The term "person" is defined at 29 U.S.C. § 1002(9) as ". . . an individual, partnership, joint venture, corporation, mutual company . . . ."

[10] The *Coleman* court also noted and concluded: "We cannot blindside Nationwide by implying the existence of obligations when the only source

noted that "the fiduciary function is not an indivisible one. In other words, a court must ask whether a person is a fiduciary with respect to the particular activity at issue." 969 F.2d at 61. In *Sommers Drug Stores*, the Fifth Circuit accepted the theory of limited fiduciary responsibility based on the statutory language of ERISA and reversed the lower court's decision based on an erroneous jury instruction on the issue. Further, the Seventh Circuit, in *Leigh v. Engle*, likewise agreed that "ERISA ties fiduciary responsibilities to a person's actual authority." 727 F.2d at 133.

Contrary to eleven years of precedent and the holdings of the Fourth, Fifth and Seventh Circuits, the Sixth Circuit in this case disregarded the limiting language of § 1002(21)(A) by holding that one who is a fiduciary under ERISA to a limited extent relating to participants and beneficiaries is a fiduciary as to the entire plan and for all purposes. Under the Sixth Circuit's holding, ERISA fiduciary status would be applied to every person or entity involved in the claims processing of an employee welfare benefit plan. To touch a claim would render one a fiduciary and a fiduciary for all purposes and to all possible persons — employees, employers, other fiduciaries, etc. Allowing the Sixth Circuit's interpretation to stand would so expand ERISA fiduciary status as to exclude no one. That was not the intent of Congress as evidenced by the limiting language of the statute it drafted.

The ramifications of the all-or-nothing concept of ERISA fiduciary status propounded by the Sixth Circuit go further still. Large ERISA employee benefit plans can touch employees in many states across the country, straddling as well the established divisions by circuit.

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of such obligations is judicial inventiveness." 969 F.2d at 61. In the present matter, however, the court of appeals felt no similar hesitancy.

The same activity in one locale and circuit could be deemed to be the activities of a fiduciary while, across an arbitrary boundary, it would not be seen as such. Diametrically different legal decisions concerning the same actions could and invariably would result. Such inconsistency encourages forum shopping and is ripe for this Court's attention and direction.

ISSUE III

Resort To The Common Law of Trusts To Expand And Judicially Legislate Additional Remedies Available Under ERISA Conflicts With This Court's Prior Decisions.

This case raises an important issue regarding the power of the courts to expand dramatically the scope and type of remedies available under ERISA. The court of appeals held that, independent and irrespective of any remedies available under ERISA, an administrator of an employee benefit plan could compel a fiduciary of the plan to an accounting on demand based upon principles of trust law. The court of appeals ignored specific provisions contained in ERISA governing when the remedy of an accounting is available, and instead found that a plan administrator is entitled to an accounting on demand regardless of whether any proof existed of either a breach of a fiduciary duty or corresponding loss to the plan.

While it is undisputed that general principles of trust law are applicable to ERISA disputes, *Firestone Tire and Rubber Company v. Bruch*, 489 U.S. 101 (1989); *Central States, Southeast and Southwest Areas Pension Fund v. Central Transport, Inc.*, 472 U.S. 559 (1985), the decision of the court of appeals conflicts with this Court's decision in *Massachusetts Mutual Life Insurance*

Co. v. Russell in that the common law of trusts does *not* supply a federal remedy where the statute itself provides one.

In *Massachusetts Mutual Life Insurance Co. v. Russell*, 473 U.S. 134 (1985), this Court held that, while § 502(a)(2) authorizes a beneficiary to bring an action against a fiduciary who has violated § 409(a), a private right of action for extra-contractual damages under § 502(a)(2) cannot be implied under ERISA. In reaching this holding, this Court relied on the four-factor analysis set forth in *Cort v. Ash*, 422 U.S. 66, 78 (1984), for determining whether implying a private right of action is warranted. Under the *Cort* analysis, the *Russell* Court found that two of the factors — legislative intent and consistency with the legislative scheme — were lacking for implying a private of action under § 502(a)(2). *Id.* at 145. This Court thus refused to imply a remedy under § 502(a)(2), finding that:

> [t]he federal judiciary will not engraft a remedy on a statute, no matter how salutary, that Congress did not intend to provide. *California v. Sierra Club*, 451 U.S. 287 (1981).

Id.

The *Russell* Court's decision against implying a private right of action was based on the very exacting language contained in ERISA:

> The six carefully integrated civil enforcement provisions found in § 502(a) of the statute as finally enacted . . . provide ***strong evidence that Congress did not intend to authorize other remedies that it simply forgot to incorporate expressly.*** The assumption of inadvertent omission is rendered especially suspect upon close consideration of ERISA's interlocking, interrelated, and interdependent remedial

> scheme, which is in turn part of a 'comprehensive and reticulated statute.' *(Emphasis added.)*

Id. at 146 (quoting *Nachman Corp. v. Pension Benefit Guaranty Corp.* 446 U.S. 359, 361 (1980)). The *Russell* Court warned against tampering with the enforcement scheme contained in ERISA: "[W]here a statute expressly provides a particular remedy or remedies, a court much be chary of reading others into it." *Id.* at 147 (quoting *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 19 (1979)).

An equitable remedy such as an accounting exists within the framework of ERISA under § 409(a) and/or the corresponding enforcement section of ERISA, § 502(a)(2). In order to invoke a remedy under § 409(a) for breach of fiduciary duty, however, one must show both proof of breach of duty and causation. 29 U.S.C. § 1109; *See Willett v. Blue Cross and Blue Shield of Alabama*, 953 F.2d 1335, 1343 (11th Cir. 1992); *Brandt v. Grounds*, 687 F.2d 895 (7th Cir. 1982). Thus, an entity seeking an accounting under § 409(a) and/or § 502(a)(2) must prove a breach of fiduciary duty and prove that that very breach caused a loss of which it complains.

Ignoring the specific ERISA statute that already provides for an accounting as well as the clear admonitions contained in *Russell* against implying or inferring a remedy into ERISA when one does not exist, the court of appeals ordered an accounting on demand, fashioning this novel remedy based *only* upon general principles of trust law. The court of appeals justified its order by relying *not* on the statutory provisions of ERISA but on the *Restatement (Second) of Trusts* §§ 172-73 (1959), which states that a fiduciary must furnish financial information to its principal on demand. App. 11a.

As earlier noted, Congress did not provide the federal judiciary the power to "engraft a remedy on a statute, no matter how salutary, that Congress did not intend to provide." *Russell*, 473 U.S. at 145 (quoting *California v. Sierra Club*, 451 U.S. 287, 297 (1981)). Congress obviously was aware that the remedies to be afforded upon breach of a fiduciary duty were enumerated in ERISA under § 409(a) and § 502(a)(2). Based upon this awareness, Congress specifically allowed recovery against a fiduciary for a fiduciary's breach under § 409(a) and § 502(a)(2). Congress' failure to provide the remedy of an accounting on demand *under any circumstances* underscores its rejection of such a remedy under ERISA.[11] If Congress had indeed intended to include such a remedy, it could and would have done so.[12]

Nor does § 502(a)(3) [29 U.S.C. § 1132(a)(3)] provide a basis for ordering an accounting on demand without proof of a breach of a fiduciary duty or a corresponding loss to the plan. Section § 502(a)(3) authorizes a civil action to be brought

> [b]y a . . . fiduciary . . . (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan.

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[11] Congress of course is presumed to have known of and known about the common law of trusts upon its drafting of the remedial portions of ERISA. *Cannon v. University of Chicago*, 441 U.S. 677 (1979).

[12] *See also Useden v. Acker*, 947 F.2d 1563, 1581 (11th Cir. 1991), *petition for cert. filed* (June 1, 1992) ("[A] court should only incorporate a given trust law principle if the statute's text negates an inference that the principle was omitted deliberately from the statute....[C]ourts should proceed with commensurate circumspection before concluding that a prominent feature of trust law was omitted from the statute merely through inadvertence.")

If the "appropriate equitable relief" for breaches of fiduciary duties available under § 502(a)(3) is broader than "the equitable or remedial relief as the court may deem appropriate" for breaches of fiduciary duties available under § 502(a)(2), then § 502(a)(2), which authorizes a civil action to be brought for a violation of § 409(a), would be rendered nugatory. *See Kemp v. Control Data Corp.*, 785 F. Supp. 74, 76 (D. Md. 1991); *Reid v. Gruntal & Co.*, 763 F. Supp. 672, 675 (D. Me. 1991). Such a result is contrary to fundamental tenets of statutory construction. *See, e.g., Nieto v. Ecker*, 845 F.2d 868, 873 (9th Cir. 1988); 2A N. Singer, *Sutherland Statutory Construction* § 46.06 (5th ed. 1992) ("A statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant.")

Even assuming, *arguendo*, that the law of trusts can supplant the specific remedial provisions of ERISA, the law of trusts does not support an accounting on demand in cases such as the present one. Under the law of trusts, "[a] trust cannot be created unless there is trust property." *Restatement (Second) of Trusts* § 74 (1959). The district court specifically found that the plan at issue was self-funded, a common current method for paying for health benefits, and without assets or trust corpus.[13] App. 32-34a. Thus, no support in trust law existed for an accounting upon demand.

Congress wanted courts to fill in the gaps in ERISA by looking to traditional trust law principles where *gaps* in ERISA existed. Where *no* gaps in ERISA exist, a court should not engraft its own remedies into ERISA. In this case, ERISA provided an explicit remedy upon proof of

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[13] LOF, it should be noted, never established a trust as mandated by ERISA. 29 U.S.C. § 1103(a) states that ". . . all assets of an employee benefit plan shall be held in trust by one or more trustees."

a breach of a fiduciary duty and causation flowing from that breach. Given that an explicit remedy existed under ERISA for the court to order an accounting, a remedy above and beyond that contained in § 409(a) should not created simply because the requirements of § 409(a) were not met. Such an interpretation of ERISA is inconsistent with this Court's prior decisions that, "where a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it." *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 19 (1979).

CONCLUSION

The decision of the court of appeals, interpreting ERISA so as to expand who should be included as a fiduciary, conflicts not only with the language contained in the statute but also is in direct conflict with decisions of other circuit courts. Thus, this petition should be granted to ensure a uniform national application of ERISA by the federal courts.

Second, the Sixth Circuit's decision expanding the remedies available under ERISA is contrary to this Court's prior decisions. Granting this petition will clear up confusion in the lower courts as to the scope of a court's power to provide a remedy not specifically delineated under ERISA.

Finally, 35 years after the *Proctor & Gamble* decision, a lack of clarity and certainty remains over the intent and interpretation of the *Proctor & Gamble* "exception". Accordingly, this petition should be granted to

give guidance once and for all to the lower courts regarding the appealability of a voluntary dismissal.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
SIXTH CIRCUIT

NO. 92-3129

LIBBEY-OWENS-FORD COMPANY,
as Administrator of the Group Health Insurance Plan,
Plaintiff-Appellant/ Third-Party Defendant,

v.

BLUE CROSS AND BLUE SHIELD MUTUAL OF OHIO,
Defendant-Appellee/ Third-Party Plaintiff,

TRINOVA CORPORATION,
as Administrator of the Group Health Insurance Plan,
Third-Party Defendant-Appellee.

On Appeal from the United States District Court for the Northern District of Ohio

Decided and Filed January 13, 1993

Before: KENNEDY, MARTIN, and SUHRHEINRICH, *Circuit Judges.*

BOYCE F. MARTIN, JR., Circuit Judge.

Libbey-Owens-Ford Co. has sought an accounting and restitution from Blue Cross and Blue Shield Mutual of Ohio under the Employment Retirement and Income Security Act, 29 U.S.C. § 1101 *et seq.*, for rebates paid by

others and for nursing home claims improperly paid by Blue Cross. Libbey-Owens-Ford appeals a pre-trial dismissal order that it had solicited. The dismissal with prejudice of the ERISA claims followed the district court's finding that Blue Cross owed no fiduciary duty under either state law or ERISA. We reverse. The grant of administrative control of an insurance plan creates a fiduciary duty, and the alleged breached duty should be determined by the district court.

The factual background begins with a November 21, 1968 Libbey-Owens-Ford Company agreement for providing health insurance by Blue Cross of Northwest Ohio. Under the terms of the agreement, Libbey-Owens-Ford would provide insurance coverage of health benefits to its eligible employees through Blue Cross. Libbey-Owens-Ford renewed the one-year contract annually until 1980. Between 1968 and 1980, Blue Cross administered claims for hospital care benefits under the group insurance policy that it also wrote. Throughout these years, Blue Cross had authority to decide all matters of coverage except to the extent that benefits were prescribed by Libbey-Owens-Ford's labor agreements with employees.

In 1980, Libbey-Owens-Ford negotiated a new contract with Blue Cross after deciding to self-insure the health needs of its employees. Under the amended agreement entered into on October 1, 1980, Libbey-Owens-Ford paid the costs of providing benefits under the plan directly to Blue Cross rather than by purchasing insurance from Blue Cross. Blue Cross continued to administer claims and decide matters of coverage, but it no longer insured the claims. Blue Cross provided monthly statements to Libbey-Owens-Ford of the amount paid to health-care providers and to other Blue Cross plans, as well as the amount of administrative

charges that Libbey-Owens-Ford owed to Blue Cross. The amended agreement required Libbey-Owens-Ford to make a deposit with Blue Cross that represented approximately two months of claims and administrative fees calculated as a percentage of the claims paid. Blue Cross used the deposits, which totaled from $2.5 to $5 million between 1980 and 1987, to pay claims on behalf of the health-insurance plan.

After the agreement was amended, Blue Cross maintained authority to deal with claims processing and payments to hospitals. It prepared administrative manuals to govern the processing of claims. The manuals outlined the procedure for an appeal when Blue Cross denied a claim submitted by an employee of Libbey-Owens-Ford. Both the amended operating agreement and the administrative manuals describe Blue Cross' authority to grant or deny claims. These materials also demonstrate that Blue Cross retained authority to resolve all disputes regarding coverage. Article III of the amended Master Group Operating Agreement outlined Blue Cross' authority to address insurance disputes:

> Any disputes which shall arise with respect to service on or with respect to benefits hereunder shall be submitted to, and resolved by, [Blue Cross] or Medical Indemnity, as the case may be, regardless of where the Enrollee shall reside. (Master Group Operating Agreement, Art. III)

The administrative manual issued in 1985 described the appeal procedure as follows:

> An employee or dependent may appeal if he/she is dissatisfied with a decision made by Blue Cross and Blue Shield . . . regarding a provision in this document. For example, if Blue

> Cross and Blue Shield rejects a claim, the employee or dependent may appeal by filing a written request for reconsideration. The written request must be submitted within 90 days after the employee or dependent has been notified of the plan's decision. The Blue Cross and Blue Shield Plan will conduct a thorough review and notify the employee or dependent of their decision. (1985 Manual at p. 7.01)

Regarding the issue of payments, Blue Cross received a discount from most Toledo area hospitals. Blue Cross generally paid hospitals at a rate of 97% of billed charges. It also audited hospital bills annually in order to determine whether any charges could be eliminated. If the revised hospital bills were less than the amounts paid by Blue Cross during the year, Blue Cross received refunds or rebates from the hospitals. Blue Cross did not credit the Libbey-Owens-Ford health insurance plan for the proceeds of these settlement audits.

In 1986, Libbey-Owens-Ford Company transferred its glass division to a wholly-owned subsidiary, LOF Glass Inc., and sold the subsidiary to Pilkington Holdings, Inc. After the sale, LOF Glass Inc. changed its name to Libbey-Owens-Ford Co. The former Libbey-Owens-Ford Company changed its name to Trinova. Also in 1986, Blue Cross of Northwest Ohio became Blue Cross and Blue Shield Mutual of Ohio.

On May 21, 1990, Libbey-Owens-Ford filed an ERISA-based complaint in the district court in its capacity as administrator and named fiduciary of the Group Health Insurance Plan for Libbey-Owens-Ford employees. On June 12, 1990, Libbey-Owens-Ford filed an amended complaint that included seven claims. First, it made an ERISA claim for an accounting of rebates received by Blue Cross. The second claim was for

declaratory judgment that Blue Cross' conduct regarding the rebates was a breach of fiduciary duty under ERISA and that restitution was due. Third, Libbey-Owens-Ford made a tort claim for conversion regarding the rebates. Fourth, Libbey-Owens-Ford claimed that Blue Cross failed to provide claims information pursuant to ERISA. Fifth, Libbey-Owens-Ford sought an accounting, declaratory judgment, and restitution under ERISA for improperly paid nursing-home claims. The sixth claim was for an accounting and damages for breach of common law fiduciary duties regarding rebates, nursing-home claims, and refusal to provide information. Seventh, Libbey-Owens-Ford made a claim for breach of contract respecting rebates, improperly paid nursing home claims, and refusal to provide information.

After unsuccessfully moving to dismiss the amended complaint for failure to join indispensable parties, Blue Cross filed its answer, a counterclaim, and a third-party complaint. The third-party complaint joined Trinova Corporation, which was Libbey-Owens-Ford's predecessor and had been the administrator of the Plan until April, 1986. The third-party complaint also joined Libbey-Owens-Ford Co. as the employer and sponsor of the Plan. The counterclaim sought contribution and indemnity against the plaintiff, and the third-party complaint sought relief from Trinova Corporation and Libbey-Owens-Ford Co.

On April 8, 1991, Libbey-Owens-Ford moved for voluntary partial summary judgment to determine whether Blue Cross was a fiduciary under ERISA and whether Libbey-Owens-Ford was entitled to an accounting upon demand. The district court denied this motion on July 30, 1991. Subsequently, Libbey-Owens-Ford moved for voluntary dismissal of its case without prejudice in accordance with Fed. R. Civ. P. 41(a)(2).

On November 25, 1991, the district court issued an opinion that set forth the conditions for dismissal and allowed Libbey-Owens-Ford the option of withdrawing its motion for partial summary judgment and proceeding with the case. In the opinion, the district court held that Blue Cross was not a fiduciary and did not have to provide an accounting to Libbey-Owens-Ford. Based upon this determination, the court ordered dismissal with prejudice of the claim for breach of common law fiduciary duties and the ERISA claims. Nonetheless, Libbey-Owens-Ford did not withdraw its motion to dismiss, and it proceeded on the merits of the case. Consequently, on January 2, 1992, the district court entered a final judgment order that dismissed with prejudice Libbey-Owens-Ford's first, second, and sixth claims for relief and eliminated all references to ERISA in the remaining claims. The district court dismissed the third, fourth, fifth, and seventh claims without prejudice pursuant to Fed. R. Civ. P. 41(a). On January 31, 1992, Libbey-Owens-Ford filed a notice of appeal.

We have jurisdiction over this case. As a general rule, neither party may appeal from a voluntary dismissal because it is not an involuntary adverse judgment. *Laczay v. Ross Adhesives*, 855 F.2d 351, 351 (6th Cir. 1988), *cert. denied*, 489 U.S. 1014 (1989). However, in this circuit, this "rule is ironclad only with respect to dismissal without prejudice." *Id.* at 354. An exception arises when the dismissal is with prejudice and "designed only to expedite review of an order which had in effect dismissed appellant's complaint." *Raceway Properties, Inc. v. Emprise Corp.*, 613 F.2d 656, 657 (6th Cir. 1980). A limit on the appellant's procedural options is necessary to prevent piecemeal appeals. When a party chooses to appeal the claims dismissed with prejudice, the party is unable to proceed in the district court with the claims that were dismissed without prejudice.

The "expedite review" exception applies to this case. The district court's decision to deny Libbey-Owens-Ford's motion for partial summary judgment had the effect of terminating Libbey-Owens-Ford's principal cause of action. Libbey-Owens-Ford's motion to dismiss must be read in light of the earlier summary judgment decision that Blue Cross was not a fiduciary under ERISA or at common law. The district court ordered dismissal with prejudice of the claim for breach of common law fiduciary duties and the ERISA claims. Consequently, Libbey-Owens-Ford fell within the exception.

Our standard of review in this case is de novo because the district court's conclusion that an administrator of a self-insured benefits plan is not an ERISA fiduciary is a conclusion of law. See *Waxman v. Luna*, 881 F.2d 237, 240 (6th Cir. 1989) (holding that when the trial court applies statutory law to the facts, the holding becomes a conclusion of law reversible under the *de novo* standard.)

We first address the question of whether ERISA is applicable to the instant case. ERISA applies to all employee benefit plans created by an employer engaged in interstate commerce or any industry affecting interstate commerce. 29 U.S.C. § 1003(a)(1). Employee benefit plans include both employee welfare benefits plans and employee pension benefit plans. Libbey-Owens-Ford contends that this case involves an employee welfare benefit plan. Pursuant to the statute, ERISA welfare benefits plans include:

> [A]ny plan, fund, or program, which . . . is . . . established for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise . . . medical, surgical, or hospital care or benefits, or

> benefits in the event of sickness, accident, disability, death, or unemployment . . . .

29 U.S.C. § 1002(1) (1991).

Employers may establish ERISA plans very easily. *International Resources, Inc. v. New York Life Insurance Company*, 950 F.2d 294, 297 (6th Cir. 1991). As defined under ERISA, employee welfare benefit plans may be created through the mere purchase of a group health insurance policy when the owner does not retain control, administrative power, or responsibility for benefits. *Id.*

Under the *International Resources* analysis, Libbey-Owens-Ford established an ERISA plan by contracting with Blue Cross to provide health insurance to Libbey-Owens-Ford employees. The company obtained coverage for its employees but did not retain control of the administration of the insurance. Blue Cross submitted a monthly statement to Libbey-Owens-Ford based on payments made by Blue Cross. In making monthly allocations to the plan, Libbey-Owens-Ford merely paid the insurance claims. Therefore, the plan comes within the provisions of ERISA.

After determining that ERISA applies, we focus on whether a fiduciary duty under ERISA is present as well. ERISA includes in its definition of a fiduciary a party with "any discretionary authority or discretionary responsibility in the administration of such [an employee benefit] plan." 29 U.S.C. § 1002(21)(A)(iii). Although the court in *International Resources* determined that ERISA applies to administrators in self-insured situations, this court has not heretofore addressed the narrow question of whether administration of an employee benefit plan creates a fiduciary duty under ERISA.

Other courts have ruled that an administrator of a self-insured employee benefit plan is a fiduciary for ERISA purposes. The Seventh Circuit has made such a determination. *Reilly v. Blue Cross and Blue Shield United of Wisconsin*, 846 F.2d 416, 419 (7th Cir. 1988). Although *Reilly* contained a dissent, the difference between the majority and dissenting opinions in *Reilly* did not concern whether ERISA imposes a fiduciary duty. Rather, the dissent addressed the factual issue of whether Blue Cross' decision to deny benefits under the plan was arbitrary or capricious. *Id.* at 426-27 (Posner, J., dissenting). Both the majority and the dissent conclude that a fiduciary duty under ERISA applied, but only the majority concludes that there was a breach of the fiduciary duty. *Id.* at 419-27. Although *Reilly* involved an individual claim and this case involves an accounting on behalf of the entire benefit plan, that factual distinction does not affect the question of whether an administrator of an ERISA plan is a fiduciary.

Several district courts have also imposed a fiduciary duty under a similar analysis. *See Blue Cross and Blue Shield of Alabama v. Peacock's Apothecary, Inc.*, 567 F.Supp. 1258, 1268 (N.D. Ala. 1983) (insurer was a fiduciary where it had the authority under the plan to review and make decisions regarding claim denials); *Sixty-Five Security Plan v. Blue Cross and Blue Shield of Greater New York*, 583 F.Supp. 380, 387 (S.D.N.Y. 1984) (claims administration rendered Blue Cross an ERISA fiduciary); and *Eversole v. Metropolitan Life Insurance Co.*, 500 F.Supp. 1162, 1164-65 (C.D. Cal. 1980) (authority to grant or deny claims is requisite discretionary authority to qualify as ERISA fiduciary).

Our main concern in order to determine the presence of a fiduciary duty is whether the insurance com-

pany has discretionary authority. The result is the same whether the insurance company is the carrier administering claims under an insurance policy or whether the insurance company is administering claims for a fee under a self-insured plan. The insurance company may have discretionary authority in both cases. When an insurance company administers claims for an employee welfare benefit plan and has authority to grant or deny the claims, the company is an ERISA "fiduciary" under 29 U.S.C. § 1002(21)(A)(iii). In this case, Blue Cross had discretionary authority regarding claims; therefore, it owed Libbey-Owens-Ford a fiduciary duty.

Finally, we are called upon to determine whether Blue Cross is obligated, as a fiduciary, to provide an accounting on demand. In order to evaluate the nature of the fiduciary duty under ERISA, we begin with the language of the 29 U.S.C. § 1104. ERISA embraces a duty of loyalty to the trust beneficiaries, 29 U.S.C. § 1104(a)(1)(A), and the prudent man standard of care, 29 U.S.C. § 1104(a)(1)(B). Fiduciaries must act "in accordance with the documents and instruments governing the plan." 29 U.S.C. § 1104(a)(1)(D).

Libbey-Owens-Ford did not bring any of the provisions of 29 U.S.C. § 1104 directly into issue or claim a breach of fiduciary duty based on the terms of the agreement. The Master Group Operating Agreement constitutes one of the "documents or instruments governing the plan" within the meaning of 29 U.S.C. § 1104(a)(1)(D). However, the record does not indicate that any provision in the plan addressed the need for an accounting. The plan was silent on the right to an audit.

Instead of arguing that Blue Cross has a fiduciary obligation to provide an accounting because of 29 U.S.C. § 1104 or the operating agreement, Libbey-Owens-Ford

asserts that Blue Cross has violated some of the general principles of trust law as incorporated into ERISA. Principles of trust law do apply to ERISA. *E.g., Central States, Southeast & Southwest Areas Pension Fund v. Central Transport, Inc.*, 472 U.S. 559, 570, *reh. denied*, 473 U.S. 926 (1985) (Congress intended that the common law of trusts to define the general scope of fiduciary responsibility). Libbey-Owens-Ford claims that it is entitled to an accounting as a result of this incorporation.

Libbey-Owens-Ford's reliance on trust principles is well-founded. A fiduciary must furnish financial information to its principal upon demand. *Restatement (Second) of Trusts* §§ 172-73 (1959). A trustee has a duty to account to beneficiaries of the trust and may be compelled to render financial data upon failure to provide such information. *Restatement (Second) of Trusts* § 172 comment c. (1959).

In denying Libbey-Owens-Ford's motion for partial summary judgment, the district court improperly concluded that, because the plan has no assets, there are no funds for which Blue Cross would be obligated to account. However, a fiduciary duty is present because Blue Cross could earmark the funds that Libbey-Owens-Ford allocated to the plan. Moreover, the amounts on deposit were substantial. Libbey-Owens-Ford deposited $2.5 to $5 million with Blue Cross between 1980 and 1987. The fiduciary duty under ERISA includes providing financial records that should have been maintained by an ERISA fiduciary upholding the prudent man standard of care. Libbey-Owens-Ford is entitled to review a reasonable number of Blue Cross' financial records for the plan within reasonable time limits.

On the basis of the preceding analysis, we reverse. We hold that Libbey-Owens-Ford is a participant in an ERISA plan and that Blue Cross is an ERISA fiduciary.

Blue Cross, as an ERISA fiduciary, had a duty to account on demand to the participants in the plan for its conduct. Consequently, Libbey-Owens-Ford can assert a claim for an accounting.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OHIO
WESTERN DIVISION

LIBBEY-OWENS-FORD CO.,
as Administrator of the
Group Health Insurance Plan,
Plaintiff,
v.
BLUE CROSS & BLUE SHIELD
MUTUAL OF OHIO,
Defendant,
BLUE CROSS & BLUE SHIELD
MUTUAL OF OHIO,
Third-Party Plaintiff,
v.
TRINOVA CORPORATION,
TRINOVA Corporation as
Administrator of the Group
Health Insurance Plan, and
LIBBEY-OWENS-FORD CO.,
Defendants.

CASE NO.
3:90CV7246

January 2, 1992

FINAL JUDGMENT ORDER

THOMAS, Senior Judge

Pursuant to this court's memorandum and order of November 25, 1991, and the court being informed that plaintiff has determined that it will not withdraw its motion to dismiss the case without prejudice, this court imposed these conditions of dismissals upon plaintiff's Rule 41(a)(2) motion:

(1) The motion is granted but with prejudice as to the First Claim for Relief, Second Claim for Relief and Sixth Claim for Relief.

(2) The motion is granted without prejudice as to Third Claim for Relief; Fourth Claim for Relief (except paragraph 40 which is stricken from Fourth Claim); Fifth Claim for Relief (except the words in paragraph 46: "and a breach of fiduciary duties under Section 404 and 406 of ERISA § 1104 and 1106" are stricken from Fifth Claim); and Seventh Claim for Relief.

Previously, plaintiff LOF moved to dismiss defendant BCBSO's Counterclaim and the Fifth and Sixth Claims for Relief of the Third-Party Complaint against LOF. By memorandum and order dated November 25, 1991 this court granted the motion with respect to the claims for contribution and indemnity but denied it with respect to the Fifth Claim for Relief. Consequently defendant's Counterclaim and Sixth Claim for Relief of the Third-Party Complaint are dismissed with prejudice.

In view of, and as a consequence of, the court's dismissal of all claims of plaintiff's complaint, as severally specified above, this court dismisses defendant BCBSO's Fifth Claim for Relief of the Third-Party Complaint against LOF and defendant BCBSO's Third-Party Complaint against TRINOVA Corporation subject only to BCBSO's right to refile said Third-Party Complaint against TRINOVA Corporation or LOF, if LOF or a plan participant refiles any of the claims heretofore dismissed without prejudice.

The plaintiff shall pay the court costs of this action.

IT IS SO ORDERED.

/s/
United States Senior District Judge

APPROVED AS TO FORM:

/s/
Counsel for Plaintiff
Libbey-Owens-Ford Co.

/s/
Counsel for Defendant
Blue Cross and Blue Shield
Mutual of Ohio

/s/
Counsel for Third-Party Defendant
TRINOVA Corporation

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OHIO
WESTERN DIVISION

LIBBEY-OWENS-FORD CO.,
as Administrator of the Group
Health Insurance Plan,
Plaintiff,
v.
BLUE CROSS & BLUE SHIELD
MUTUAL OF OHIO,
Defendant,
BLUE CROSS & BLUE SHIELD
MUTUAL OF OHIO,
Third-Party Plaintiff,
v.
TRINOVA CORPORATION,
TRINOVA Corporation as
Administrator of the Group
Health Insurance Plan, and
LIBBEY-OWENS-FORD CO.,
Defendants.

CASE NO.
[3]:90CV7246

November 25, 1991

MEMORANDUM AND ORDER

THOMAS, Senior Judge

Plaintiff Libbey-Owens-Ford Co. "as Administrator of the Group Health Insurance Plan . . . moves this court pursuant to Fed. R. Civ. P. 41(a)(2) to dismiss the case without prejudice on the ground that the court's decision as reflected in the Memorandum and Order of July 30, 1991, severely handicaps plaintiff's ERISA claims and procedurally renders the litigation too costly to pursue." BCBSO retorts:

> LOF now laments that this litigation has become "too costly to pursue."[1] (Plaintiff's Motion to Dismiss, p. 1). This is, LOF asserts, due to the Court's ruling against it on its Motion for Partial Summary Judgment and "... much procedural maneuvering and discovery dispute instigated by BCBSO...." (Plaintiff's Motion, p. 1; Plaintiff's Memorandum, p. 3). [Footnote 1 omitted.]
>
> To remedy this sad state of affairs into which it has fallen, LOF seeks a voluntary dismissal of its case pursuant to Federal Rule of Civil Procedure ("Fed. R. Civ. Pro.") 41(a)(2). Conveniently and not so subtly, LOF seeks a dismissal upon grounds most favorable to it, *i.e.*, a dismissal without prejudice and absent any conditions whatsoever. Because LOF initiated and entangled BCBSO in this ill-advised lawsuit, all to BCBSO's significant expense and prejudice, such an unconditional dismissal without prejudice is entirely inappropriate and insupportable.

Plaintiff particularizes:

> There is no basis to require a dismissal of this case with prejudice. *Federal Rule of Civil Procedure* 41(a)(2) makes it clear that a dismissal under it is *without prejudice* unless specifically stated in the order to the contrary. The proper terms and conditions of a dismissal at plaintiff's instance are left to the Court. But, to require a dismissal of this case to be with prejudice, would require some reasonable basis upon which to conclude that a harsh and final disposition is warranted. Some ground upon which to conclude that plaintiff should be punished would be necessary. No such ground exists in this case.

Plaintiff's Rule 41(a)(2) motion is considered on the briefs of the parties, this court's ruling in this case including this court's Memorandum and Order of July 30, 1991, and upon the record of this case.

I.

A. (1)

On May 21, 1990 Libbey-Owens-Ford Co. filed its complaint with jury demand against Blue Cross Blue Shield of Ohio; and on June 12, 1990 plaintiff filed its amended complaint. Paragraph 1 of the amended complaint states:

> This action is brought by plaintiff on behalf of an [sic] in its capacity as administrator and named fiduciary of the Group Health Insurance Plan (the "Plan"), which provides health care benefits to certain employees of Libbey-Owens-Ford Co. ("participants") and other beneficiaries, against defendant Blue Cross and Blue Shield Mutual of Ohio pursuant to the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. §§ 1101 *et seq.* Jurisdiction exists in this Court under 28 U.S.C. § 1331 and 29 U.S.C. § 1132(a) and (e)(1) and, with respect to the state law claims, the doctrine of pendent jurisdiction.

In 1968 and continuing thereafter, Libbey-Owens-Ford Company (LOF-I) and Blue Cross of Northwest Ohio, predecessor of defendant Blue Cross and Blue Shield Mutual of Ohio (hereinafter either "BCBSMO" or "BCBSO") entered into a Master Group Operating Agreement ("MGOA") whereby Blue Cross of Northwest Ohio and its participating plans established for the employees of LOF-I, hospital, surgical, medical and

related health care benefits (National Account Program). Effective the first day of October, 1980, LOF-I and Blue Cross of Northwest Ohio entered into an "Amendment to Group Contract":

> This Amendment, when attached to the Group Contract, establishes a procedure for the enrollment of employees, the periodic payment of fees, and the settlement of amounts due the Blue Cross Plan and the Blue Shield Plan, herein referred to as "The Plan," for benefits provided Enrolled Employees and their eligible dependents under the attached Certificate.

The term "Group Contract" in the title "Amendment to Group Contract," is equivalent to "Master Group Operating Agreement." The unamended provisions of the MGOA continued in effect after the first day of October, 1980.

In 1986, Libbey-Owens-Ford Company (LOF-I) transferred its LOF Glass Division to a wholly-owned subsidiary, LOF Glass, Inc., and sold the subsidiary to Pilkington Holdings. After the sale, LOF Glass, Inc., changed its name to Libbey-Owens-Ford Co. (LOF-II) and the former Libby-Owens-Ford Company changed its name to Trinova. Also in 1986, Blue Cross of Northwest Ohio became Blue Cross and Blue Shield of Ohio. In his affidavit, Roger A. Kintner, Administrator for Employee Benefits at Libbey-Owens-Ford Co., states:

> In 1986, when the LOF Glass Division was sold to Pilkington, the health care plan for employees of the LOF Glass Division remained with LOF Glass and continued in effect as before the sale . . . . Blue Cross and Blue Shield administered claims for hospital and other health care benefits for LOF Glass employees, continued to do so after the sale, and

> continued to decide matters of coverage under the health care plan. The Administrative Manuals attached to this affidavit remained in effect until January 1, 1988.

Hereafter LOF-II will be identified as LOF.

In its first claim for relief LOF asserts:

> 22. As a fiduciary under ERISA and under Ohio and common law, BCBSMO owes fiduciary obligations to the Plan respecting all aspects of its administration of claims under the Plan, including a duty to account to the Plan.
>
> . . .
>
> 25. Plaintiff is unable to ascertain what injury may have been suffered by the Plan as the result of defendant's actions because of defendant's continued refusal to provide information. The Plan is entitled to an accounting from BCBSMO of all amounts received by BCBSMO and its Affiliate BC/BS Companies from providers relating to reimbursable costs of services provided to Plan participants and beneficiaries.

In its second claim for relief, "plaintiff seeks a declaratory judgment that defendant has violated Sections 404 and 406 of ERISA, 29 U.S.C. §§ 1104 and 1106, and that plaintiff is entitled to restitution and damages on behalf of the Plan pursuant to Sections 409 and 502 of ERISA, 29 U.S.C. §§ 1109 and 1132 . . . ."

In its third claim for relief plaintiff charges that to the extent that BCBSMO has "knowingly and wilfully refused to reimburse or credit the Plan for such refunds or rebates on demand, BCBSMO has converted such refunds or rebates." The fourth claim for relief charges:

> Because of BCBSMO's failures to provide information required, it was impossible to prepare or compile a statistical data base respecting claims arising on or before December 31, 1987. All efforts and sums expended on the project to compile information respecting those claims were to no avail due to BCBSMO's breach. Damages incurred as a result are estimated to exceed $200,000 plus interest and recovery proper under Sections 409 and 502 of ERISA, 29 U.S.C. §§ 1109 and 1132.

In the fifth claim for relief the plaintiff asserts that the terms of the Plan provide "no coverage for a plan of treatment which does not require skilled nursing services and is designed solely to assist the patient with simple activities of daily living or to provide an institutional environment as a convenience to the patient ("custodial or domiciliary care")." It is further asserted:

> As a fiduciary, BCBSMO is required to account to the Plan and plaintiff is entitled to such an accounting with respect to all claims paid to convalescent and long-term care facilities for Plan participants and beneficiaries from October 1, 1980 to present.

Plaintiff "seeks a declaratory judgment . . . that there has been a breach of fiduciary duties under Sections 404 and 406 of ERISA, 29 U.S.C. §§ 1104 and 1106, and for restitution in an appropriate amount . . . ."

The sixth claim for relief claims that "BCBSMO owed fiduciary duties to the Plan under state law based upon the relationship created by ASO arrangement and Plan documents," and again plaintiff says it is "entitled to an accounting and to damages for breach of fiduciary duties."

In the seventh and final claim for relief plaintiff asserts:

> To the extent BCBSMO or its affiliate BC/BS Companies received refunds or rebates from providers related to services provided to participants or beneficiaries under the Plan and failed to reimburse or credit the Plan for such refunds or rebates as alleged in plaintiff's Second Claim for Relief, BCBSMO has breached the contract among the parties, evidenced by the plan documents.

For this alleged breach and for a breach of contract due to "BCBSMO's refusal to provide information as alleged in plaintiff's Fourth Claim for Relief," plaintiff says it is "entitled to recover damages . . . in an amount which cannot now be calculated."

I.
A. (2)

On July 12, 1990 defendant moved to dismiss for failure to join indispensable parties. Briefing by both parties followed. In an oral hearing on November 2, 1990 this court overruled the motion on grounds stated orally, but granted leave to the defendant to file a counterclaim against LOF and a third party complaint against Trinova Corporation. These pleadings were later filed. At the oral hearing the court and counsel worked out outstanding discovery questions.

At a teleconference on January 11, 1991, the parties discussed outstanding discovery matters and attempted to agree on wording of a protective order. Subsequent efforts were unsuccessful. At a hearing of March 8, 1991 the court was presented with three possible drafts. In chambers it was generally felt that "the proposed draft of the protective order . . . can be laid . . . for the period involved in an agreed procedure." Plaintiff was to file a motion for summary judgment. Earlier, in open court, LOF counsel thus framed two issues, "Was Blue Cross

Blue Shield a fiduciary under the plan? and. secondly whether if so, is the plan entitled to an accounting before a determination of liability." Also, LOF announced its intention to move to dismiss BCBSO's counterclaim against LOF and BCBSO's third party complaint against Trinova Corporation. A briefing schedule for the several motions was established. Finally, at LOF's behest, BCBSO's requests for production of documents was reduced from 100 to 35, to comport with the standing order in the Western Division.

On March 12, 1991 plaintiff filed its motion to dismiss defendant's counterclaim and third party complaint. On April 8, 1991 plaintiff moved for partial summary judgment and also filed an Appendix. On April 29, 1991 BCBSO filed its opposition brief to plaintiff's motion to dismiss and on May 20, 1991 plaintiff LOF filed its reply in support of motion to dismiss counterclaim/third party complaint. On June 19, 1991, BCBSO filed its opposition brief to plaintiff's motion for partial summary judgment. On July 15, 1991 plaintiff filed its reply in support of motion for partial summary judgment. On July 30, 1991 this court filed its 29 page memorandum and order denying plaintiff's motion for partial summary judgment.

On July 30, 1991 this court issued a notice of status conference for August 16, 1991. "Agenda: Issues of trial, Completion of discovery, Date of Trial, Possible Resolution Short of trial and Miscellaneous matters." At the postponed hearing on August 26, 1991, plaintiff LOF placed on the agenda "a motion for the dismissal of the action" and, if granted, then a motion for dismissal of the contingent counterclaim and third party complaint. Plaintiff filed its motion and brief on September 9, 1991. On October 2, 1991 BCBSO filed its opposition brief and on October 21, 1991 plaintiff LOF filed its reply brief.

For use in connection with plaintiff LOF's motion to dismiss, plaintiff LOF on October 21, 1991 attaches to its Reply BCBSO's Responses, filed January 3, 1991, to LOF's Requests for production of documents and Interrogatories. Of the 41 Requests and Interrogatories, BCBSO answered that it will produce for inspection and copying, nine sets of documents. BCBSO denied the remaining 32 requests and interrogatories. Not without reason in many categories, BCBSO stated as a ground for denial that the request was overbroad and unduly burdensome. However, a tailoring of demands would probably have resulted in agreed or ordered production. Similarly, defendant's objections based on "unclear and uncertain terminology" might well lead to revised terminology and enforceable discovery. But, to date, it appears that while defendant BCBSO did not comply with LOF's notice for a Rule 30(b)(6) deposition on October 18, 1990, Ms. VanDervort [sic], in her letter of December 18, 1990, informed LOF counsel that, "We are proceeding to determine an appropriate person to produce with reference to your Rule 30(b)(6) Notice." To date, it appears that neither this deposition nor any other deposition has been held in this case.

BCBSO attaches to its Sur-Reply of November 18, 1991: Exhibit B (BCBSO's First Set of Interrogatories Propounded to LOF as Administrator of the Group Health Insurance Plan), Exhibit C (BCBSO's First Request for Production of Documents Propounded to LOF as Administrator of the Group Health Insurance Plan), and Exhibit D (BCBSO's First Request for Admissions propounded to LOF as Administrator of the Group Health Insurance Plan). While the court has not seen LOF's responses, docket entries indicate that LOF's extensions of time in which to respond expired on 4/26/91 as to BCBSO's first request for production of documents, on 5/3/91 as to BCBSO's first set of inter-

rogatories and on 5/28/91 for BCBSO's first request for admissions. Presumably, LOF has filed its responses because BCBSO in its Sur-Reply referring to the above attachments, states:

> This is a portion of the discovery conducted by BCBSO of only the most preliminary nature. Such discovery was entirely reasonable and necessary to meet and defend the claims asserted against it. Further, the information sought was required by BCBSO to meet the various LOF Motions, including its Motion for Partial Summary Judgment.

II.

A.

In pertinent part Fed. R. Civ. P. 41 provides:

> (a) Voluntary Dismissal: Effect Thereof.
>
> (1) *By Plaintiff; by Stipulation* . . .
>
> (2) *By Order of Court.* Except as provided in paragraph (1) of this subdivision of this rule, an action shall not be dismissed at the plaintiff's insistence [sic] save upon order of the court and upon such terms and conditions as the court deems proper.
>
> . . .
>
> Unless otherwise specified in the order, a dismissal under this paragraph is without prejudice.

Wright and Miller, *Federal Practice and Procedure:* Civil § 2364 at 161, 163-4 declares, "Dismissal on motion under Rule 41(a)(2) is within the sound discretion of

the court"[1] and this discretion "is a judicial, rather than an arbitrary, discretion . . . and the court should endeavor to insure substantial justice to both parties." Importantly,

> The purpose of Rule 41(a)(2) "is primarily to prevent voluntary dismissals which unfairly affect the other side, and to permit the imposition of curative conditions." Accordingly the courts have generally followed the traditional principle that dismissal should be allowed unless the defendant will suffer some plain legal prejudice other than the mere prospect of a second lawsuit. It is not a bar to dismissal that plaintiff may obtain some tactical advantage thereby.

Id. at 165 (footnotes omitted).

In *Olsen v. Muskegon Piston Ring Co.*, 117 F.2d 163 (6th Cir. 1941), four years after the adoption in 1937 of the Federal Rules of Civil Procedure, the Sixth Circuit anticipated Wright and Miller's later explication of the Rule, although the court did not refer to Rule 41(a)(2).

> While it is true, as urged by appellant, the [sic] ordinarily a plaintiff has an absolute right to discontinue his action up to the time of trial, this rule is subject to the exception that the plaintiff may not, by so doing, subject the defendant to some plain

---

[1] *Smoot v. Fox*, 340 F.2d 301 (6th Cir. 1964) mandamused the trial court to grant plaintiff's motion to dismiss his case with prejudice. It did so after first recognizing the discretion that Rule 41(a)(2) gives a trial court to dismiss a case without prejudice.

> Rule 41(a)(2) of the Federal Rules of Civil Procedure provides, "Except as provided in paragraph (1) of this subdivision of this rule, an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper." This rule contemplates the dismissal by plaintiff of an action without prejudice and is clearly discretionary with the court. *Id.* at 302.

> legal prejudice other than the mere prospect of a second litigation upon the same subject-matter. *Jones v. Securities and Exchange Commission*, 298 U.S. 1, 19 [1936]; *City of Detroit v. Detroit City Ry. Co*, C.C., 55 F. 569, 572; *Individual Drinking Cup Co. v. Union News Co*, 2 Cir. 250 F. 625.

Id. at 165 (parallel citations omitted). This 1941 Sixth Circuit interpretation of Rule 41(a)(2) conforms to a 1988 interpretation in *Conafay v. Wyeth Laboratories*, 841 F.2d 417 (D.C. Cir. 1988), cited by defendant BCBSO in its opposition memorandum (p. 6) and by plaintiff LOF in its reply (p. 5). Insofar as presently pertinent, *Conafay* sums up the Rule 41(a)(2) decisional law:

> In considering appellants' motion for voluntary dismissal, it is clear that the district court attached too much significance to two factors: (1) the expense and inconvenience to appellee of enduring a second round of litigation in a different forum; and (2) appellee's submission of the motion for summary judgment.
>
> With respect to the first factor, it is beyond dispute that, to justify the denial of a motion for voluntary dismissal, a district court must find that dismissal will inflict clear legal prejudice on a defendant. *See, e.g., Andes v. Versant Corp.*, 788 F.2d 1033, 1036 (4th Cir. 1986) (voluntary dismissal "should not be denied absent substantial prejudice to the defendant"); *McCants v. Ford Motor Co.*, 781 F.2d 855, 856-57 (11th Cir. 1986) ("in most cases a dismissal should be granted unless the defendant will suffer clear legal prejudice"); *Hamilton v. Firestone Tire and Rubber Co.*, 679 F.2d 143, 145 (9th Cir. 1982) ("plain legal prejudice" required); *LeCompte v. Mr. Chip, Inc.*, 528 F.2d 601, 604 (5th Cir.

> 1976) (dismissal should generally be granted "unless the defendant will suffer some legal harm"); . . .

Id. at 419. The *Conafay* court further held:

> While the parameters of "legal prejudice" are not absolutely clear, it is nevertheless certain that the term in this context means "something other than the necessity that defendant might face of defending another action. That kind of disadvantage can be taken care of by a condition that plaintiff pay to defendant its cost and expenses incurred in the first action." *Kern v. TXO Production Corp.*, 738 F.2d 968, 970 (8th Cir. 1984). *See also Conafay*, 793 F.2d at 353; *McCants*, 781 F.2d at 857; *Hamilton*, 679 F.2d at 145-46; *Puerto Rico Maritime Shipping Authority v. Leith*, 668 F.2d 46, 50 (1st Cir. 1981); *LeCompte*, 528 F.2d at 604.

Id. at 419.

Continuing its opinion in *Olsen v. Muskegon Piston Ring Co.*, the Sixth Circuit makes this ruling that is crucial to the disposition of plaintiff's Rule 41(a)(2) motion:

> Leave to dismiss a bill should not be granted where beyond the incidental annoyance of a second litigation upon the same subject matter, such action would be manifestly prejudicial to the defendant. *Electrical Accumulator Co. v. Brush Electric Co.*, C.C., 44 F. 602, 605. The rule that an exception exists to the right of a plaintiff to dismiss his bill upon payment of the costs, while often exercised where the defendant has acquired rights by some order or decree entered in the case (Cf. *Chicago & Alton Railroad Co. v. Union Rolling Mill Co.*, 109 U.S. 702, 713, 714, 3 S.Ct. 594, 27 L.Ed. 1081), is not confined to such cases. *Stevens v. The Railroads*,

> C.C., 4 F. 97. The exception may be based on the nature of the defense, the conduct of the parties, or circumstances appearing in the record which show that it would be inequitable to allow the dismissal without prejudice.

117 F.2d at 165. Noting that "as a general rule, a complainant in an original bill has the right at any time, upon payment of costs, to dismiss his bill," the Supreme Court in *Chicago & Alton Railroad Co.* went on to hold:

> [T]his latter rule is subject to a distinct and well settled exception, namely, that after a decree, whether final or interlocutory, has been made, by which the rights of a party defendant have been adjudicated or such proceedings have been taken as entitle the defendant to a decree, the complainant will not be allowed to dismiss his bill without the consent of the defendant.

109 U.S. at 713.

Olsen's application of the *Chicago & Alton Railroad* exception to a plaintiff's right to voluntarily dismiss the complaint has not been modified in the ensuing fifty years. *Olsen* has been cited by the Sixth Circuit, but only as an authority to support the proposition that "[d]ismissal of an action with prejudice is a complete adjudication of the issues presented by the pleadings and is a bar to a further action between the parties." *Smoot v. Fox*, 340 F.2d 301, 303 (6th Cir. 1964); *England v. Automatic Canteen Co. of America*, 349 F.2d 988, 989:

> A dismissal of a suit with prejudice bars a subsequent action seeking the same relief. *Olsen v. Muskegon Piston Ring Co.*, 117 F.2d 163 (C.A. 6).[2]

---

[2] In an unpublished per curiam opinion, *Frank N. Ali, M.D. v. St. John Hospital, et al.*, No. 87-1087 (6th Cir. Dec. 30, 1987), the Sixth Circuit reversed a voluntary dismissal without prejudice. The Court of Appeals

II.

B.

On July 30, 1991 this court denied plaintiff LOF's motion for partial summary judgment to order an accounting on demand against BCBSO. At Part II. A. this court recognized:

> To grant plaintiff LOF's motion for summary judgment LOF must show as a matter of law, first, that BCBSO is a fiduciary for purposes of 29 U.S.C. § 1002(21)(A); and second, if BCBSO is deemed a fiduciary, that LOF has the right to an accounting from BCBSO on demand. BCBSO's capacity as a fiduciary under ERISA is first considered.

Further in Part II, this court decided, "that from the standpoint of LOF's employees and dependents BCBSO qualifies as a fiduciary under ERISA under 29 U.S.C. § 1132(a)(1)(B)." The court then proceeded in Part III to "independently" examine "LOF's right to seek an accounting on demand from BCBSO."

> Plaintiff argues that "[a]s a fiduciary, BCBSO must account to the Plan for its administrative activities." It then asserts: "[T]he provisions of ERISA regarding fiduciaries are designed to parallel the common law of trusts and should be interpreted consistent with that law. See *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 110-11 (1989); *Nichols*

[took] note of an unusual circumstance in this case. The district court had already granted the Hospital's motion for dismissal and summary judgment as to nine out of ten cou[n]ts. The district court in so doing stated that Michigan law is "clear" with regard to the issues involved on those counts. Thus, the district court concluded on the merits that most of Ali's action failed to state a claim for which relief could be granted, then without explanation, gave new life to those claims by dismissing the action without prejudice, paving the way for Ali to take "a second bite at the apple" as to these counts.

v. Asbestos Workers Local 24 Pension Plan, 835 F.2d 881 n. 100 (D.C. Cir. 1982); *Donovan v. Dillingham*, 688 F.2d 1367, 1370 (11th Cir. 1982)."[6]

[6/] *Nichols v. Asbestos Workers Local 24 Pension Plan, supra*, Note 100, states, "The legislative history of 404 (29 U.S.C. § 1104) reveals a clear congressional intent to impose obligations on fund trustees under ERISA that parallel the responsibilities that the common law of trusts applies to fiduciaries." This statement misses the present mark since the LOF Plan is unfunded and BCBSO, as a fiduciary solely with reference to the appeal of denied claims cannot be equated with "fund trustees." *Donovan v. Dillingham, supra*, is equally inapposite.

LOF's Motion brief at 16. *Firestone* does declare, "ERISA abounds with the language and terminology of trust law." *See, e.g.*, 29 U.S.C. § 1002(7) ("participant"), 1002(8) ("beneficiary"), 1002(21)(A) ("fiduciary"), 1003(a) ("trustee"), 1104 ("fiduciary duties"). *Id.* at 110. However, it is evident that the ERISA "trust law" is directed at certain ERISA remedies under 29 U.S.C. § 1132(a)(1)(B).

> ERISA provides "a panoply of remedial devices" for participants and beneficiaries of benefit plans. *Massachusetts Mutual Life Ins. Co. v. Russell*, 473 U.S. 134, 146 (1985). Respondents' action asserting that they were entitled to benefits because the sale of Firestone's Plastics Division constituted a "reduction in work force" within the meaning of the termination pay plan was based on the authority of

> § 1132(a)(1)(B). That provision allows a suit to recover benefits due under the plan, to enforce rights under the terms of the plan, and to obtain a declaratory judgment of future entitlement to benefits under the provisions of the plan contract.

Id.

The *Firestone* Court thus circumscribes its decision:

> The discussion which follows is limited to the appropriate standard of review in § 1132(a)(1)(B) actions challenging denials of benefits based on plan interpretations. We express no view as to the appropriate standard of review for actions under other remedial provisions of ERISA.

Id. at 108.

Undoubtedly, the *Firestone* statement of "trust law" would apply to an LOF participant's or beneficiary's civil action against BCBSO as a fiduciary under § 1132(a)(1)(B) if BCBSO were charged with improper exercise of discretionary authority in handling the appeal of a Group Health Insurance Plan claim. But, LOF cannot parlay its employees' putative remedies under § 1132(a)(1)(B), governed by ERISA "trust law," into an action for an accounting on demand against BCBSO.

This court then rejected plaintiff's related argument:

> Plaintiff also contends that it has a right to an accounting based on the common law of trusts. In support, it cites the *Restatement (Second) of Trusts* (1959) and the *Restatement (Second) of Agency* (1958). Turning attention to the *Restatement (Sec-*

ond) of Trusts (1959), in particular § 74 "The Necessity of Trust Property" states, "A trust cannot be created unless there is trust property." Similarly, as stated in G. Bogert, *Trusts* § 25 (6th Ed. 1987), "Every trust must have some property as its subject matter or res," and "[a] trust without subject matter is inconceivable." *Id.* at 70-71.

In the present case, in its annual IRS Form 5500's, during the relevant time period, the LOF Group Health Plan reports it has no assets, i.e., the Plan is unfunded.[7]

In its March 25, 1991 Memorandum and Order in *Dana Corporation v. Blue Cross & Blue Shield Mutual of Northern Ohio, et al.*, Case No. C87-7734, this court held:

> Moreover, as a matter of law, when an employer operates an employee welfare benefit plan as an unfunded plan, "no trust corpus exist [s]." *Berlin v. Michigan Bell Tel. Co.*, 858 F.2d 1154, 1157 (6th Cir. 1988). Similarly, *Levy v. Lewis*, 635 F.2d 960 (2nd Cir. 1980), holds, "Even if a plan existed, it was unfunded and hence no 'assets' existed." *Id.* at 968.

Id. at 23. So here, since the LOF plan has no assets and therefore no trust corpus, a trust does not exist.

Additionally, plaintiff LOF asserts "[a] fiduciary must account to its principal upon demand." The "Amendment to Group Contract" makes it

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[7] Counsel for plaintiff forthrightly admitted the unfunded nature of the Plan in a June 7, 1991 recorded teleconference.

quite evident that a trust relationship between LOF and BCBSO was not intended by the parties in their cost plus agreement under which BCBSO performed administrative services for LOF's Group Health Insurance Plan. Paragraphs 5 and 7, set forth *supra* at 4, demonstrate that BCBSO's "monthly statement" to the "Employer" (LOF) created a contractual creditor-debtor relationship.

For these reasons plaintiff is not entitled to an accounting of trust funds. There are no trust funds for which to account.

This court finally dealt with a relevant provision of ERISA on which LOF does not rely:

Plaintiff makes no claim under 29 U.S.C. § 1109. Had it included such a claim, with BCBSO considered a fiduciary for a limited purpose, plaintiff would have been required to prove that BCBSO breached its duties as such fiduciary and that such breach is causally connected to its claim for an accounting. In *Brandt v. Grounds*, 687 F.2d 895 (7th Cir. 1982), the court reviewed 29 U.S.C. § 1109 which provides remedies for breach of fiduciary duties and held that the language of § 1109 "clearly indicates that a causal connection is required between the breach of fiduciary duty and the losses incurred by the plan." *Id.* at 898. The court further observed, "it is clear that without the causal connection between the advice and the loss, no liability can exist under 29 U.S.C. § 1109(A)." *Id.*

This court thus concluded its ruling:

On its other claims plaintiff may or may not be able to show that BCBSO owes it for "refunds and rebates" described in 24 and the "amounts" described in 25, but it is evident that these monies do

not constitute a trust fund for which LOF is entitled to an accounting.

Upon the foregoing grounds, this court denies plaintiff LOF's motion for partial summary judgment to order an accounting on demand against BCBSO.

On every point, both on the undisputed factual relationship between LOF and BCBSO and as a matter of law, this court has adjudicated against LOF its claims that BCBSO is a fiduciary for purposes of 29 U.S.C. § 1002(21)(A), and that LOF has the right to an accounting from BCBSO on demand.

This court finds this adjudication brings this case within the *Olsen* exception, *supra* at 13,

> The rule that an exception exists to the right of a plaintiff to dismiss his bill upon payment of the costs [is] often exercised where the defendant has acquired rights by some order or decree entered in the case (Cf. *Chicago & Alton Railroad Co. v. Union Rolling Mill Co.*, [citation omitted]). . . .

117 F.2d at 165.

Therefore, it is concluded that as to the following specific claims of LOF's amended complaint (List A hereunder), the court imposes a condition that its Rule 41(a)(2) motion for voluntary dismissal shall be granted with prejudice. But as to List B hereunder, the remaining claims of LOF's amended complaint may be dismissed without prejudice.

LIST A (Dismissed With Prejudice)

First Claim for Relief

Second Claim for Relief

Sixth Claim for Relief

LIST B (Dismissed Without Prejudice)

Third Claim for Relief

Fourth Claim for Relief except for paragraph 40 which is deleted from List B.

Fifth Claim for Relief, except for words in paragraph 46, "and a breach of fiduciary duties under Sections 404 and 406 of ERISA §§ 1104 and 1106," which words are deleted from List B.

Seventh Claim for Relief

The plaintiff will be given the opportunity within two weeks from the date of service of this memorandum and order to withdraw its motion to dismiss without prejudice. However, in any ensuing prosecution of this action, the adjudications in this court's memorandum and order of July 30, 1991 and in the written memorandum and order shall constitute the rule of law of this case. However, this court treats as pendent state claims[3] and will proceed to litigate those claims for relief which are set forth in List B, *supra*.

The foregoing conditions are the only ones the court attaches to granting plaintiff's Rule 41(a)(2) motion. Because of these foregoing conditions, it is determined that it would be inappropriate to consider assessing any of defendant's attorney fees as a further condition. Furthermore, the court will not consider any discovery costs as a condition of dismissal. The actual discovery obtained by defendant was either related to the motion for summary judgment on which it is now

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[3] In its motion to dismiss, II. B., BCBSO argued that, "LOF's State Law Claims are Pre-empted by ERISA and Must Be Dismissed." For the reasons set forth in this court's memorandum and order in *Dana Corporation v. Blue Cross & Blue Shield Mutual of Northern Ohio*, No. C87-7734 (N.D. Ohio Mar. 25, 1991), and particularly pages 12-24, this court determines that LOF's state law claims are not pre-empted by ERISA.

further prevailing, or to plaintiff's motion to dismiss defendant's counter claim and third party complaint which motion this court is granting in a separate order. As seen, BCBSO raised objection to any LOF discovery requests which BCBSO deemed "overbroad and unduly burdensome."

II.

C.

In its Reply in Support of Plaintiff's Motion to Dismiss, plaintiff LOF declares:

> This court denied LOF's motion on July 30, 1991, indicating in its Memorandum and Order that the case is likely to be dismissed for lack of subject matter jurisdiction. [*See* Memorandum and Order at footnote 2.]

Footnote 2 reads:

> [2/] ERISA does not regulate the duties of a non-fiduciary plan administrator. Thus, non-fiduciaries cannot be held liable under ERISA. *Howard v. Parisian, Inc.*, 807 F.2d 1560, 1564-65 (11th Cir. 1987); *Casper Air Service v. Sun Life Assurance Company*, 752 F. Supp. 1005, 1009 (D. Wyo. 1990). LOF has not asserted that LOF may bring a claim under ERISA even if BCBSO is not a fiduciary. Th[u]s, its claim must be dismissed if BCBSO is held not to be a fiduciary. See also *Ed Miniat, Inc. v. Globe Life Insurance Group, Inc.*, 805 F.2d 732, 737 (7th Cir. 1986).

The footnote refers to plaintiff's claim that BCBSO is a fiduciary and as such BCBSO is required to account on demand to LOF. However, this court has now ruled that if plaintiff withdraws its motion to dismiss the court

retains jurisdiction over the several pendent state claims, intertwined as they are with the alleged ERISA claim.

In any event, the Sixth Circuit, in *Bush v. State Industries, Inc.*, 599 F.2d 780, 784 (6th Cir. 1979), holds:

> Thus, in determining whether a federal court has jurisdiction over the subject matter of a claim, it must look to see whether the alleged claim actually "arises under" the Constitution or federal statutes and is not made solely for the purpose of obtaining jurisdiction. Furthermore, a federal court must determine whether the position of the plaintiff is of any legal substance. However, the fact that a complaint may not state claim upon which relief can be granted is of no relevance to the question of subject matter jurisdiction.

Id. at 784-85. This last sentence is quoted with approval in *Cromwell, et al. v. Equicor-Equitable*, No. 90-3564, slip op. at 7 (6th Cir. Sept. 11, 1991).

With legal substance, plaintiff alleges in its amended complaint that BCBSO is a fiduciary for purposes of 29 U.S.C. § 1002(21)(A) [ERISA]. As alleged, this claim arises under federal statutes. Hence, this court has jurisdiction over the subject matter of this claim. This court's adjudications in its memorandum and order of July 30, 1991 and its adjudications in this memorandum and order establish that plaintiff has failed in its claim that BCBSO is a fiduciary under ERISA. However, applying *Bush* and *Cromwell*, these adjudications do not deprive this court of subject matter jurisdiction to make the July 30, 1991 rulings, nor to make today's rulings on plaintiff's Rule 41(a)(2) motion.

III.

Not later than two weeks from receipt of this memorandum and order the plaintiff shall file written notice with the court and opposing counsel of its intended course of action, as directed in Part II. B., *supra* at 14.

IT IS SO ORDERED.

/s/

United States Senior
District Judge

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

LIBBEY-OWENS-FORD COMPANY, as Administrator of the Group Health Insurance Plan
Plaintiff - Appellant
v.
BLUE CROSS AND BLUE SHIELD MUTUAL OF OHIO
Defendant - Appellee
v.
TRINOVA CORPORATION, as Administrator of the Group Health Insurance Plan
Defendant - Appellee

Case No: 92-3129

February 1, 1993

ORDER

Before: KENNEDY, MARTIN and SUHRHEINRICH, Circuit Judges.

Upon consideration of the petition for rehearing filed by the appellee,

It is ORDERED that the petition for rehearing be, and it hereby is, DENIED.

ENTERED BY ORDER OF THE COURT

/s/

Leonard Green, Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

LIBBEY-OWENS-FORD CO.,
As Administrator of The Group
Health Insurance Plan,
Plaintiff-Appellant,
v.
BLUE CROSS AND
BLUE SHIELD
MUTUAL OF OHIO,
Defendant-Appellee/
Third Party Plaintiff,
TRINOVA CORPORATION,
As Administrator of The Group
Health Insurance Plan, and
LIBBEY-OWENS-FORD CO.,
Third-Party Defendants.

Case No: 92-3129

February 23, 1993

ORDER

Before: KENNEDY, MARTIN, and SUHRHEINRICH, Circuit Judges.

The opinion in this case was filed on January 13, 1993. Counsel for Blue Cross and Blue Shield Mutual of Ohio moved for a rehearing en banc on February 8, 1993. A previous motion for rehearing by the panel was denied on February 1, 1993. Rule 40(a) of the Federal Rules of Appellate Procedure provides a fourteen-day period from the date of the decision of the Court of Appeals during which a motion to reconsider or a motion for a rehearing en banc must be filed. Failure to file a request for a rehearing, by the panel or by the court en banc, within that period makes review of the decision impossible without prior leave of court. The

fourteen-day period for requesting en banc consideration may not be extended by filing a timely request for a panel rehearing, even if the first request is filed within the fourteen-day period.

Because the motion was filed in this case after the fourteen-day period, this court is divested of further appellate jurisdiction and the mandate of the court should issue immediately.

ENTERED BY ORDER OF THE COURT

/s/

Leonard Green, Clerk